

<div>CITY OF SAN JOSÉ, CALIFORNIA Department of Planning, Building and Code Enforcement 801 North First Street, Room 400 San José, California 95110-1795</div> <div>STAFF REPORT</div>	Hearing Date/Agenda Number P.C. 4/9/03 Item 3.e.	
	File Number CP03-020 & ABC03-006	
	Application Type Conditional Use Permit	
	Council District 1	
	Planning Area West Valley	
	Assessor's Parcel Number(s) 381-37-025	
PROJECT DESCRIPTION		
Completed by: Darren McBain		
Location: Northwest corner of Saratoga Avenue and Prospect Road		
Gross Acreage: 6.2 Net Acreage: 6.2 Net Density: n/a		
Existing Zoning: CG Commercial General Existing Use: Supermarket (under construction)		
Proposed Zoning: CG Commercial General Proposed Use: Sale of alcoholic beverages for off-site consumption		
GENERAL PLAN		
Completed by: DM		
Land Use/Transportation Diagram Designation General Commercial		Project Conformance: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> See Analysis and Recommendations
SURROUNDING LAND USES AND ZONING		
Completed by: DM		
North: Bowling alley and professional offices		CG Commercial General
East: Westgate Shopping Center		CG Commercial General
South: Various commercial/retail uses		CP Commercial Pedestrian
West: Westgate West Shopping Center		CG Commercial General
ENVIRONMENTAL STATUS		
Completed by: DM		
<input type="checkbox"/> Environmental Impact Report found complete <input type="checkbox"/> Negative Declaration circulated on <input type="checkbox"/> Negative Declaration adopted on		<input checked="" type="checkbox"/> Exempt <input type="checkbox"/> Environmental Review Incomplete
FILE HISTORY		
Completed by: DM		
Annexation Title: Payne No. 2		Date: 9/18/58
PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION		
<input checked="" type="checkbox"/> Approval <input type="checkbox"/> Approval with Conditions <input type="checkbox"/> Denial <input type="checkbox"/> Uphold Director's Decision	Date: _____	Approved by: _____ <input checked="" type="checkbox"/> Action <input type="checkbox"/> Recommendation
OWNER/APPLICANT/DEVELOPER		
West Valley Shopping Center, Inc. c/o Joseph P. Franco / PW Supermarkets 2277 Alum Rock Avenue San José, CA 95116		

PUBLIC AGENCY COMMENTS RECEIVED

Completed by: DM

Department of Public Works

None Received

Other Departments and Agencies

See attached memorandum from Police Department (Vice Unit), dated March 24, 2003.

GENERAL CORRESPONDENCE

None received

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

The applicant, PW Supermarkets, is requesting a Conditional Use Permit (CUP) to allow off-site sale of alcoholic beverages at an existing supermarket (under construction) in a shopping center (West Valley Shopping Center) located at the northwest corner of Saratoga Avenue and Campbell Avenue. The Zoning Ordinance requires a CUP for off-sale of alcoholic beverages in the CG Commercial General Zoning District. For this site, a Liquor License Exception Permit is also required, because the California State Department of Alcoholic Beverage Control has determined that the proposed establishment requesting the sale of alcoholic beverages is located in a census tract in which the ratio of existing liquor licenses to the tract's population is higher than the average for the County.

The proposed use is to be located in an approximately 43,000-square-foot PW supermarket that was approved in 2000 (File No. H00-037). The subject premises are located within the West Valley shopping center, which was demolished and redeveloped under H00-037. Construction of the supermarket and other buildings in the center is currently nearing completion. Some tenant spaces in the center have already been completed and occupied.

Other nearby development includes a bowling alley and professional offices to the north, Westgate shopping center across Saratoga Avenue to the east, various commercial uses across Prospect Avenue to the south, and Westgate West shopping center (a separate but contiguous entity) to the west of the site.

Other businesses in the area that sell alcoholic beverages include a restaurant (Frankie, Johnny, and Luigi's) in the West Valley shopping center, and the Trader Joe's and Smart and Final stores at Westgate West shopping center. A comprehensive summary of establishments that sell alcoholic beverages within this census tract is shown on the attached location map. A Target store across Saratoga Avenue to the east received Planning approval for the sale of alcoholic beverages (File No. CP03-001 & ABC03-001) on March 12, 2003.

Project Description

The subject premises are currently under construction. Under this permit, the off-sale of alcoholic beverages would only be allowed for the subject grocery store user and not for other tenants within

the surrounding retail center. No additional building square footage may be constructed as part of this project. The facility would continue to operate during normally allowed business hours. No extended hours of operation are included in this proposal.

ENVIRONMENTAL REVIEW

The Director of Planning has determined that this project is exempt from environmental review under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act.

GENERAL PLAN CONFORMANCE

The proposed commercial use is consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of General Commercial.

ANALYSIS

The key issues analyzed for the proposed project are the requirements for issuance of an alcoholic beverage license by the State Department of Alcoholic Beverage Control under the Business and Professions Code, conformance to the Zoning Ordinance regulations related to the off-sale of alcoholic beverages, and the City's Liquor License Exception Permit. As described in greater detail below, it is staff's opinion that the proposed project adequately conforms to the criteria related to these permits.

CA Department of Alcoholic Beverage Control (ABC)

The ABC is responsible for the issuance of alcoholic beverage licenses in accordance with the requirements of the Alcoholic Beverage Control Act (CA Business and Professions Code). They issue a wide variety of retail licenses for both on-sale (on-site) and off-sale (off-site) consumption. State law limits the number of premises licensed for the various types of sales. The number of off-sale beer and wine licenses is limited to one for each 2,500 people in a city or county. The number of off-sale beer and wine licenses that can be issued in a city or county *in combination with* off-sale general licenses is limited to one for each 1,250 people.

ABC can impose license conditions to place special restrictions on a license. Conditions may limit the hours of alcohol sales, the type of entertainment allowed or other aspects of the business. Conditions may eliminate the need to deny a license.

State law requires ABC to deny license applications under certain circumstances. Some grounds for protest or denial of a license are:

(a) Applicant is not qualified. For example, the applicant falsified his application, has a disqualifying police record, has a record of chronic insobriety, is not the true owner, or is not at least 21 years of age, and/or

(b) Premises are not suitable. The law says ABC may deny any retail license located within the immediate vicinity of churches and hospitals, or within at least 600 feet of schools, public playgrounds and nonprofit youth facilities. Generally, ABC will deny a license in those situations when there is evidence that normal operation of the licensed premises will be contrary to public

welfare and morals. Mere proximity by itself is not sufficient to deny the license. ABC will not license a new retail location within 100 feet of a residence, unless the applicant can establish that the operation of the proposed premises will not interfere with the quiet enjoyment of the property by residents. Other examples include when the premises are located in a high-crime area and does not serve public convenience or necessity; the license would create a public nuisance; or the local zoning is improper for alcohol sales.

Section 93958 of the B&P Code requires ABC to deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an “undue concentration” of licenses. The state law allows an exception for ABC to issue a license if the local governing body determines that “public convenience or necessity” would be served by the issuance of the license (B&P Section 23958.4). The B&P Code defines undue concentration which is generally as either:

- ✍ the premises of the proposed license is located in a crime reporting district that has 20 percent more reported crimes than the average number of reported crimes for the City as a whole, or
- ✍ the premises of the proposed license is located in a census tract where the ratio of existing retail on/off-sale licenses to population in the census tract exceeds the ratio of retail licenses to population in the County of the proposed premise.

There are certain types of licenses that are not subject to the over-concentration controls, such as restaurants and license transfers.

Zoning Ordinance

The project proposes the sale to consumers of alcoholic beverages in original, unopened packages for consumption off the premises where sold. The Zoning Ordinance requires a Conditional Use Permit for off-sale alcohol in the CG Commercial General Zoning District. In accordance with Section 20.80.900, the Planning Commission may issue the Conditional Use Permit for off-sale of alcoholic beverages only upon making the following additional findings, where applicable:

1. For such a use at a location closer than 500 feet from any other such use either within or outside the City that the proposed location of the off-sale alcohol use would not contribute to an excess concentration of establishments which sell alcoholic beverages, or
2. For such a use at a location closer than 500 feet from any child care center, elementary school, secondary school, college or university, or one hundred fifty (150) feet from any residentially zoned property that the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential and/or school use.

Liquor License Exception Permit

The applicant is also applying for a Liquor License Exception Permit. A Liquor License Exception Permit is required for liquor license applicants that has been or may be denied by the ABC pursuant to the Business and Professions Code as referenced above. If the ABC determines that a liquor license application would result in an undue concentration, an applicant may request a Liquor License Exception Permit from the City based on “public convenience or necessity.” In 1995, the City Council approved delegation of authority to grant liquor license exceptions to the Director of

Planning and the Planning Commission. As with all discretionary permits, it is the Director's responsibility to evaluate the input for the proposal based on adopted criteria and guidelines.

The following are the exception criteria for geographical, public safety, and legal considerations as adopted by the City Council.

1. If the premises of the proposed license is located in :
 - a. The Downtown Core Area/Downtown Entertainment District - Exceptions may be allowed.
 - b. In existing Project Crackdown/Weed & Seed areas, or in similar areas which would qualify for these programs based on the City's Neighborhood Revitalization Strategy Criteria - Exceptions may not be allowed.
 - c. Proximity to schools- Exceptions may be considered if there is at least a 300 foot separation from any public or private school (preschool through high school) unless the Exception is within the Downtown Core Area.
 - d. An existing business – Exceptions may be allowed if the business has been in continuous existence without a substantial change in method of operation.
2. If the City's Police service investigative information (including, but not limited to site-specific neighborhood analysis of calls for service) indicates that the use would pose a detriment to the immediate neighborhood or continue current law enforcement problems – Exceptions should not be granted.
3. If the use is legal per Title 20 (including legal non-conforming uses) and has the required land use permits – Exceptions may be considered.

The criteria are generally permissive allowing the proposed use if it satisfies at least one criterion and is not located in a Project Crackdown or similar City project area. The primary geographical criterion considers the Downtown Core as a special area for Exceptions. In contrast, the criteria disallow the granting of Exception Permits in an existing or future Project Crackdown/Weed & Seed area. The public safety criterion would allow an exception if the site specific neighborhood information for the proposed use would not pose a detriment to the immediate neighborhood or exacerbate existing law enforcement problems. The last criterion also allows an Exception to be issued if the use is legal per the Zoning Code (Title 20).

In 1997, the City Council adopted Resolution No. 67681, which identified 24 census tracts in the City as areas of over-concentration under the Caldera legislation criteria. In addition the resolution approved only full service grocery stores located in the 24 census tracts as eligible for consideration for a public convenience or necessity exception. Restaurants and associated banquet facilities in those census tracts are to be considered on a case by case basis.

The Planning Commission may grant the Liquor License Exception Permit, in conjunction with the Condition Use Permit, if it makes the following findings:

1. The premises are not located in an existing Project Crackdown /Weed and Seed Area or similar areas that qualify for these programs pursuant to the City's Neighborhood Revitalization Strategy.
2. The premises are not located within 300 feet of any public or private school.

3. The City's Police Department has determined that the use would not pose a detriment to the immediate neighborhood or continue current law enforcement problems.

The proposal is for a full service grocery store. The project site is located within Census Tract 5062.02. Police Department staff determined that the subject site is not located in one of the census tracts identified as problematic areas by City Council Resolution (see attachment). Further, the attached memorandum¹ from the Police Department Special Investigation/Vice unit confirmed that the shopping center is not located within any Project Crackdown, Weed and Seed, or Strong Neighborhood Initiative (SNI) Area, and is not located in an area with over a 20% crime index. The Police Department is of the opinion that granting this Conditional Use Permit would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.

The subject site is not located within 500 feet of any child-care center, or public or private school. The nearest residential site is approximately 450 feet away on Graves Avenue.

However, the project site *is* located within 500 feet of other establishments that sell alcoholic beverages. Police and ABC staff have determined that the issuance of an additional liquor license in this census tract would make this census tract "unduly" concentrated per the applicable State Code sections as noted above. An Exception Permit is therefore required. However, it is Planning staff's opinion that consideration and issuance of an Exception Permit adequately addresses the issue of over-concentration, and that the proposed use adequately conforms to the intent of CUP Finding No. 1, above.

It is the Planning Department's standard practice for requests for both a CUP for off-sale and a Liquor License Exception Permit to first consider the proposal's conformance to the three Exception findings enumerated above. This represents a more rigorous test than the CUP findings. Since the proposal is in conformance with the three criteria, this constitutes an adequate basis for a determination of "public convenience or necessity." The proposed project conforms to these requirements, in that the premises are not located in any of the listed program areas, are not located within 300 feet of a school, and (per the Police memo for the project) are not expected to pose a detriment to the neighborhood or law enforcement activities. Therefore, a Liquor License Exception is, in staff's opinion, justified. Furthermore, the project conforms to the CUP criteria for off-sale and should be approved.

Conclusion

The off-sale of alcohol is not expected to prove detrimental to the neighborhood, and the proposed project would provide a convenient outlet for groceries and other necessities along with the incidental sale of alcoholic beverages. The building in which the proposed use is to be located is located such that it would not adversely affect the nearby land uses.

RECOMMENDATION

The Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and include the following findings and conditions in its Resolution.

¹ The Police memo identifies Prospect Road as Campbell Avenue in its location description. Campbell Avenue changes its name to Prospect Road as it crosses Saratoga Avenue.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The project site is located on the northwest corner of Saratoga Avenue and Prospect Road (5205 Prospect Road)
2. The site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
3. The project site is located in the CG Commercial General Zoning District.
4. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended. The project will not have a significant adverse effect on the environment.
5. The subject site is generally surrounded by commercial land uses
6. The project proposes the sale of alcoholic beverages for off-site consumption by a full service grocery store.
7. The Zoning Ordinance requires a Conditional Use Permit for off-sale alcohol in the CG-Commercial General Zoning District.
8. A Conditional Use Permit may be issued for the off-sale of alcoholic beverages if the Planning Commission makes the findings required by San José Municipal Code Sections 20.08.900 and 20.100.720.
9. A Liquor License Exception Permit is required as the Police Department and CA Department of Alcoholic Beverage Control have determined that the issuance of an additional liquor license in this census tract would make this census tract “unduly” concentrated per the applicable State Code sections.
10. The project consists of the off-sale of alcoholic beverages in an approved retail building (under construction).
11. The proposed use is located within 500 feet of another establishment that sells alcoholic beverages.
12. The proposed use is not located within 150 feet of a residential land use.
13. The project site is located within Census Tract 5062.02.
14. The subject site is not located in one of the census tracts identified by the City Council as problematic areas for such uses.

14. The Police Department Special Investigation/Vice unit confirmed that the shopping center is not located within any Project Crackdown, Weed and Seed, or Strong Neighborhood Initiative (SNI) Area, and is not located in an area with over a 20% crime index.
15. The Police Department is of the opinion that granting this Conditional Use Permit would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.
16. The subject site is not located within 500 feet of any child-care center, or public or private school.
17. The premises are not located within 300 feet of any public or private school.
18. The nearest residential site is approximately 450 feet away on Graves Avenue.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.
4. The proposed use is located closer than 500 feet from any other such use either within or outside the City.
5. The proposed location of the off-sale alcohol use would not contribute to an excess concentration of establishments in that it would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.
6. The project is consistent with the criteria for approval of a Liquor License Exception Permit and serves public convenience or necessity.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not
 - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
 - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
 - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and

3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
 - b. By other public or private service facilities as are required.
4. The subject site is not located in an existing Project Crackdown/Weed and Seed Area, Project Crackdown Area, or Strong Neighborhoods Initiative (SNI) Area or similar areas that qualify for these programs on the City's Neighborhood Revitalization Strategy Criteria.
5. The proposed use is not located within 300 feet of any public or private school.
6. The proposed off-sale alcohol use would not pose a detriment to the immediate neighborhood or continue current law enforcement problems.

In accordance with the findings set forth above, a Conditional Use Permit and a Liquor License Exception Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS PRECEDENT

This Conditional Use Permit and Liquor License Exception Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be **signed, notarized, and returned** to the Department of City Planning within **60 days** from the date of issuance of the resolution granting the permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.* Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the Acceptance Form.

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the

San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.

2. **No New Construction.** No additional construction or development is approved under this permit.
3. **Nuisance.** This use shall be operated in a manner which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
4. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
5. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed/permitted unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.
6. **Off-Sale of Alcoholic Beverages.** This permit allows the sale of alcoholic beverages for off-site consumption.
7. **Compliance with Other Permits.** The developer shall comply with all terms and conditions of the previously approved Site Development Permit (File No. H00-037).
8. **Alcoholic Beverage Control.** The off-sale of alcoholic beverages is allowed in conformance with the requirements of the Department of Alcohol Beverage Control (ABC). The applicant shall obtain all necessary permits maintain full compliance and in good standing with the Department of Alcoholic Beverage Control.




CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit/Liquor License Exception Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit/Liquor License Exception Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit/Liquor License Exception Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
2. **Revocation, Suspension, Modification.** This Conditional Use Permit/Liquor License Exception Permit may be revoked, suspended or modified by the Planning Commission, or by the

City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Conditional Use Permit/Liquor License Exception Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
- b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
- c. The use as presently conducted creates a nuisance.

Attachments:

-  Police memo
-  City Council Resolution identifying census tracts considered problematic for alcoholic beverage sales
-  Location map